

August 3, 2020

Via Regulations.gov

U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
Attn: Docket ID No. EPA-HQ-OAR-2020-00044

Re: Industry Trade Association Comments on EPA's Proposed Rule: Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process

To Whom It May Concern:

The Regulatory Improvement Council has coordinated with the following trade associations in preparing and submitting the following comments on the U.S. Environmental Protection Agency's ("EPA" or the "Agency") proposed rule entitled "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process":<sup>1</sup> The Aluminum Association; American Coatings Association; American Coke and Coal Chemicals Institute; American Composites Manufacturers Association; American Forest & Paper Association; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; American Wood Council; Color Pigments Manufacturers Association; Commodity Markets Council; Construction Industry Roundtable; Corn Refiners Association; The Fertilizer Institute; Industrial Energy Consumers of America; National Asphalt Pavement Association; National Automobile Dealers Association; National Cotton Council; National Grain and Feed Association; National Mining Association; National Oilseed Processors Association; National Tooling and Machining Association; North American Die Casting Association; North American Insulation Manufacturers Association; Pavement Coatings Technology Council; Portland Cement Association; Precision Machined Products Association; Precision Metalforming Association; and Small Business & Entrepreneurship Council. All of the associations have members that are subject to Clean Air Act ("CAA") regulations and all have a compelling interest in ensuring that EPA is both effective in protecting human health and the environment and as economically efficient as possible in administering the CAA.

We applaud EPA for undertaking this important rulemaking. The Nation does not have unlimited resources to commit to any of its important priorities, including protecting and enhancing air quality through implementation of the CAA. Benefit-cost analysis ("BCA") is a powerful analytical tool that can help determine whether government regulations produce net

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<sup>1</sup> 85 Fed. Reg. 35612 (June 11, 2020).

benefits to society. The information provided by BCA should be an important factor in prioritizing CAA rulemaking and, where permissible, in making decisions about the scope and stringency of emissions limitations and standards.

Our comments focus on two key aspects of the proposed rule – whether BCA should be established as a mandatory element of CAA rulemaking and whether BCA should be required to be factored into regulatory decision-making. We contend that the answer to both questions is a resounding “yes.”

Our comments flow from EPA’s proposal that the BCA rule should be established as a rule of internal agency procedure that “would not regulate any person or entity outside the EPA and would not affect the rights or obligations of outside parties.”<sup>2</sup> Under this approach, decisions about whether to conduct a BCA or whether to use a BCA in regulatory decision-making would not be obligations enforceable by third parties. Instead, such decisions would be wholly discretionary and would allow EPA to choose not to conduct a BCA for a given rule and even to decide to dispense altogether with preparing BCAs for all CAA rules. This weakens the force and effect of the rule and virtually ensures that it will not create a durable practice that will stand the test of time in the face of ever-changing political winds.

As explained below, EPA has ample legal authority to establish an *enforceable* legal obligation that BCAs be performed for CAA rules and, under most CAA substantive authorities, require that BCAs be considered when deciding the scope and stringency of emissions limitations and standards. We urge EPA to do so in the final rule.

**I. EPA should make preparation of a BCA for all significant CAA rules an enforceable obligation.**

As a first step, EPA should establish in the final rule a legal obligation for the Agency to perform a BCA for all significant CAA rulemakings,<sup>3</sup> such that a failure to perform a BCA or a failure to perform an adequate BCA (as defined by the methodological requirements proposed to be included in the rule) would be a procedural violation that could be challenged in court by third parties. The requirement would be limited to preparing a suitable BCA but would not specify how the BCA for any given rule should be considered or factored into regulatory decision-making.

This limited approach would provide greater assurance that the Agency and interested third parties would have the results of a BCA available as an affected rule is being formulated. It

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<sup>2</sup> 85 Fed. Reg. at 35613.

<sup>3</sup> “Significant regulation” is defined in proposed § 83.1 as “a proposed or final regulation that is determined to be a “significant regulatory action” pursuant to Section 3(f) E.O. 12866 or is otherwise designated as significant by the Administrator.” 85 Fed. Reg. at 35625.

also would be consistent with the policy of every administration since the Reagan administration to require rigorous economic analysis grounded in BCA for significant legislative rules.<sup>4</sup>

This approach also would significantly improve the durability of the BCA requirement because EPA would have to conduct subsequent rulemaking to eliminate the obligation to perform a BCA, which would require EPA to specify a rationale for eliminating the BCA requirement and allow for that rationale to be tested in court.<sup>5</sup> This would be a big improvement over the current proposal, which would allow EPA at its unreviewable discretion to depart from the rule's requirements. This approach also would indirectly incentivize the use of BCA in regulatory decision making (especially in the many CAA provisions where cost may or must be considered) because failure to consider the highly relevant information provided by a BCA could cause the final rule to be arbitrary and capricious.<sup>6</sup>

EPA can and should rely on at least two separate sources of legal authority for establishing a legally enforceable obligation to perform a BCA for significant CAA rules. First, as EPA notes, CAA § 301(a)(1) provides authority to issue the BCA rule and is expansive enough to make it legally enforceable. The D.C. Circuit has cautioned that § 301 “does not provide the Administrator with *carte blanche* authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the Administrator wishes.”<sup>7</sup> Having said that, the court held that § 301 “is sufficiently broad to allow the promulgation of rules that are necessary and reasonable to effect the purposes of the Act.”<sup>8</sup>

With regard to the “purposes of the Act,” in the very first section of the CAA – § 101, “Congressional Findings and Declaration of Purpose” – Congress unambiguously asserts the dual purposes of protecting and enhancing air quality “so as to promote the public health and welfare and the productive capacity of its population.” CAA § 101(b)(1). In other words, EPA must implement the CAA to protect health and the environment, but it must do so in an economically efficient manner. Few (if any) analytical tools do a better job of enabling EPA to make appropriately informed decisions about achieving these dual objectives than a BCA.

Requiring a BCA to be performed for significant rules also is “necessary and reasonable” to accomplish these purposes. BCA is the appropriate vehicle for examining quantitatively whether an appropriate balance has been struck between promoting health and the environment and promoting the economy. Moreover, a hallmark of arbitrary decision making is failing to consider relevant factors.<sup>9</sup> The relative costs and benefits of an intended rule are plainly relevant

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<sup>4</sup> Paul R. Noe and John D. Graham, *The Ascendancy of the Cost-Benefit State?*, *Administrative Law Review Accord*, Vol. 5, No. 3 (Winter 2020) 85, 90; *see also* 85 Fed. Reg. at 35614.

<sup>5</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, (2016) (“Whatever potential reasons the Department might have given [for changing a longstanding policy], the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision.”).

<sup>6</sup> *See infra* Section II and footnote 16.

<sup>7</sup> *Citizens to Save Spencer Co. v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979).

<sup>8</sup> *NRDC v. EPA*, 22 F.3d 1125, 1148 (D.C. Cir. 1994).

<sup>9</sup> *Motor Vehicle Mfrs. Ass'n. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

in setting standards under the CAA where cost may be considered. Even in the limited situations under the CAA where EPA cannot consider cost in setting standards, conducting a BCA will help maximize the effectiveness of those standards.

Thus, a mandate to perform BCAs for significant rules is justified under CAA § 301 because it is “necessary and reasonable” to achieving the dual purposes of the CAA.

A second and independent legal basis for establishing an enforceable BCA mandate is EPA’s programmatic substantive rulemaking authority. There is strong precedent under the CAA for EPA to use this approach. For example, EPA has set General Provisions under 40 C.F.R. Parts 60 (New Source Performance Standards), 61 (National Emissions Standards for Hazardous Air Pollutants), and 63 (“MACT” standards) that effectively governed subsequent source-category-specific regulations issued under these programs. Each of these General Provisions includes detailed and prescriptive requirements that apply to subsequent categorical rules unless EPA makes category-specific changes through rulemaking. These General Provisions were adopted under the CAA provisions that authorize or require EPA to establish emissions limitations and standards under these various programs.<sup>10</sup>

EPA also has established rules governing certain Agency adjudications, which operate in an analogous way. For example, 40 C.F.R. § 63.43 includes detailed requirements governing case-by-case source-specific “MACT” determinations by EPA and the states under CAA § 112(g). Similarly, 40 C.F.R. § 51 Appendix W establishes detailed and prescriptive modeling methods that must be used by EPA and the states in conducting air quality analyses as part of New Source Review permitting. Although these requirements apply to source-specific determinations, they demonstrate how EPA has relied on substantive CAA authorities to establish rules governing the implementation of those authorities.

The same approach could be used here to create an enforceable obligation to perform BCAs for significant rules. Section II, below, identifies the key substantive CAA rulemaking authorities that would provide a program-by-program basis for establishing the BCA obligation.<sup>11</sup>

## **II. Unless clearly prohibited by the statute, EPA also should require BCA to be considered in establishing CAA emissions limitations and standards.**

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<sup>10</sup> See, e.g., 58 Fed. Reg. 42760 (Aug. 11, 1993) (Explaining that the Part 63 General Provisions are proposed “pursuant to Section 112 of the Clean Air Act (Act) as amended November 15, 1990.”).

<sup>11</sup> In addition, it should be noted that EPA is explicitly identified as a “covered agency” under the provisions of 5 U.S. Code §609(d)(2) and required to analyze when any rule is promulgated which will have a significant economic impact on, or will increase the cost of credit for, a substantial number of small entities, including small businesses, non-profits, local and county governments and school districts. In complying with the analysis provisions of this title, 5 U.S. Code §607 gives EPA explicit discretionary authority to provide a quantifiable description of the effects of a proposed rule or alternatives to the proposed rule. A final rule to require conducting BCA for any significant rulemaking also would allow EPA to significantly improve its analyses of rule impacts on small entities.

BCA would achieve its fullest effect if it were not only an enforceable obligation, but also required to be factored into decisions about the scope and stringency of CAA emissions limitations and standards. In particular, unless consideration of costs is clearly prohibited by the statute, EPA should bind itself not to regulate unless the incremental benefits justify the incremental costs. Virtually all CAA substantive provisions authorize or require EPA to consider cost in setting standards. The authority or obligation to consider cost under relevant substantive programs provides legal authority for EPA to promulgate regulations specifying *how* it will consider cost. EPA can and should use that authority as the basis for requiring BCA to be considered in making substantive decisions under each of these programs, such that incremental benefits must justify the incremental costs.

As noted in the proposal, the U.S. Supreme Court upheld EPA's consideration of costs and "the relationship between those costs and the environmental benefits produced" in setting standards for cooling water intake structures under Clean Water Act § 1326(b).<sup>12</sup> The court concluded that § 1326(b) is ambiguous as to whether and how cost may be considered and that EPA's use of cost-benefit analysis was a reasonable exercise of its discretion.<sup>13</sup>

More recently, the U.S. Supreme Court rejected EPA's decision not to consider cost in deciding under CAA § 112(n)(1)(A) whether it was "appropriate and necessary" to regulate emissions of air toxics from power plants. While the § 112(n)(1)(A) "appropriate and necessary" standard does not expressly require consideration of cost, the Court determined that that term is broad enough to allow for consideration of cost and that EPA's decision to ignore cost as a relevant factor was arbitrary and capricious.<sup>14</sup> The Court remarked favorably on Justice Breyer's partial concurrence in *Entergy*, reiterating his observation that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems."<sup>15</sup> The Court ultimately concluded that, "It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost."<sup>16</sup>

These cases signal an appreciation by the U.S. Supreme Court of the value of BCA and a willingness to view EPA's use of BCA in appropriate circumstances as reasonable and acceptable, including situations where the statute leaves EPA with discretion as to whether and how to consider cost in standard setting.<sup>17</sup> Indeed, some commentators believe that *Entergy* and *Michigan* mark a positive "inflection point" in the Supreme Court's understanding and

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<sup>12</sup> *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009).

<sup>13</sup> *Id.*

<sup>14</sup> *Michigan v. EPA*, 135 S. Ct. 2699, \_\_\_ (2015).

<sup>15</sup> *Id.*, quoting *Entergy* at 233 (Breyer, J., concurring in part and dissenting in part).

<sup>16</sup> *Id.* at \_\_\_.

<sup>17</sup> Arguably, these cases make an even stronger point: it would be arbitrary and capricious for EPA not to consider BCA in setting standards under statutory provisions allowing for or requiring consideration of costs.

acceptance of BCA,<sup>18</sup> and set forth an emerging default rule that “agencies *must* weigh costs and benefits, at least in some fashion,” absent a clear statutory instruction to the contrary.<sup>19</sup>

In any event, these cases provide a firm legal foundation for significantly expanding the role of BCA in CAA regulatory decision-making. Listed below are the key CAA substantive authorities, along with a discussion of whether and how the authority may be used to require consideration of BCA.

- A. National Ambient Air Quality Standards (“NAAQS”), CAA § 109:** EPA is required to establish primary NAAQS at a level that is requisite to protect public health with an adequate margin of safety. The U.S. Supreme Court ruled that cost may not be considered in setting NAAQS.<sup>20</sup> However, CAA § 109(d)(2)(A) requires the Administrator to establish an independent review panel (the “Clean Air Science Advisory Committee,” or CASAC) to provide advice on NAAQS standard setting. And, CAA § 109(d)(2)(C) specifies that CASAC’s advice must include “any adverse public health, welfare, social, *economic*, or energy effects which may result from various strategies for attainment and maintenance of [NAAQS].”<sup>21</sup> Since CASAC largely relies on information generated by EPA to fulfill its responsibilities, CAA § 109 provides the legal basis for requiring BCA to be performed for each NAAQS rulemaking.
- B. New Source Performance Standards (“NSPS”), CAA § 111:** NSPS must establish standards of performance that “reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account *the cost of achieving such reduction* and any nonair quality health and environmental impact and energy requirements) the Administrator has determined has been adequately demonstrated.”<sup>22</sup> Thus, the CAA expressly requires costs to be considered in setting NSPS emissions standards. Over time, EPA has assessed cost in various ways under this program – for example, sometimes looking at industry-wide impacts,<sup>23</sup> while at other times looking at the cost effectiveness of control measures (e.g., in dollars per ton removed). In this context, the use of BCA in setting NSPS standards can and should be prescribed under CAA § 111.
- C. Regulation of Hazardous Air Pollutants (“HAP”), CAA § 112:** There are several rulemaking authorities that must be considered under CAA § 112. First, EPA has an obligation to promulgate so-called Maximum Achievable Control Technology standards

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<sup>18</sup> Noe and Graham at 86.

<sup>19</sup> Jonathan S. Masur and Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. Chi. L. Rev. 935, 976 (2018); see also, Noe and Graham at 144.

<sup>20</sup> *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457 (2001).

<sup>21</sup> CAA § 109(d)(2)(C) (emphasis added).

<sup>22</sup> CAA § 111(a)(1) (emphasis added).

<sup>23</sup> Because feasibility analysis can be an easily manipulatable, “standard-less” standard, and produce quite disparate industry-by-industry outcomes, consideration of costs using such a feasibility approach could be arbitrary and capricious. See, e.g., Masur and Posner at 657 (concluding that feasibility analysis lacks a normative justification, can just as easily lead to under-regulation as to over-regulation, and should have no place in government regulation).

under CAA § 112(d) for HAP major sources and may promulgate MACT standards for area sources. CAA § 112(d) provides that MACT standards may be no less stringent than prescribed “floor” levels, but allows EPA to set more stringent “above the floor” standards when warranted by the consideration of several factors, including cost.<sup>24</sup> This regulatory structure allows for the use of BCA to mandated in making “above the floor” determinations.

EPA also is required under CAA § 112(f)(2) to conduct a one-time risk assessment within eight years after promulgating a MACT standard to determine whether it should be adjusted to address significant remaining risk. EPA’s risk assessment method requires different approaches depending on the predicted level of risk. Risks estimated to be less than one-in-a-million are considered acceptable and require no further action. Risks above 100-in-a-million are considered presumptively unacceptable and require further action. Risks between one- and 100-in-a-million are presumptively safe but require further analysis to determine if action is needed to achieve an ample margin of safety. It is well established that cost is a factor to be considered in making this ample margin of safety determination.<sup>25</sup> This provides an avenue for the use of BCA in CAA § 112(f) standard setting.

Lastly, CAA § 112(d)(6) requires EPA to conduct a technology review at least every eight years for each MACT standard, which allows standards to be adjusted to reflect advances in air pollution control technology for each source category. EPA may consider cost in deciding whether advances in technology warrant a change to an existing standard,<sup>26</sup> and the BCA could be prescribed as the method for considering these costs under CAA § 112(d)(6). This ability is particularly important where operating unit design, physical plot space limitations, resource use and conservation, etc., are all increasingly important factors with significant economic implications to consider when new emission control technology is considered.

- D. Best Available Control Technology (“BACT”), CAA § 169(3):** BACT is the level of emissions control that must be prescribed in EPA and state major source preconstruction permits issued under the Prevention of Significant Deterioration (“PSD”) program. As defined in CAA § 169(3), BACT must be determined taking into account “economic impacts and other costs.” Various measures are used to consider cost, although it is common to use the cost effectiveness of emissions controls (usually measured in dollars per ton removed) as the metric for comparing the cost of the available emissions control options. EPA mandate the use BCA in its own PSD permits and to encourage the use of BCA in state-issued PSD permits.
- E. Regional Haze, CAA §§ 169A and B:** CAA § 169A establishes a national goal of eliminating manmade contribution to visibility impairment in “mandatory Class I areas,”

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<sup>24</sup> CAA §§ 112(d)(2) and (3).

<sup>25</sup> *NRDC v. EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008).

<sup>26</sup> *Ass’n. of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 673-4 (D.C. Cir. 2013).

which mostly consist of national parks. The program is administered by the states, which must show that reasonable progress is made over successive ten-year planning periods. CAA § 169A(g)(1) expressly provides that the “costs of compliance” must be taken into consideration in determining reasonable progress. EPA can and should encourage states to use BCA in assessing cost in making reasonable progress demonstrations.

- F. Reasonably Available Control Measures and Reasonably Available Control Technology, CAA § 172(c)(1):** State nonattainment plans are required under CAA § 172(c)(1) to implement “reasonably available control measures (“RACM”),” which includes “reasonably available control technology” (“RACT”) for existing sources. Cost is a relevant factor in determining both RACM<sup>27</sup> and RACT.<sup>28</sup> Most RACM and RACT determinations are made by the states in preparing their implementation plans. EPA can and should encourage states to employ BCA in making their cost effectiveness assessments.
- G. Mobile Sources and Fuels, CAA § 202 *et seq.*:** Each of the primary regulatory authorities under Title II of the CAA requires costs to be considered in setting standards. For example, CAA § 202 provides general authority for EPA to regulate emissions from motor vehicles. CAA § 202(a)(2) expressly requires EPA to consider the “cost of compliance” when setting motor vehicle standards. The same is true for mobile source air toxics (CAA § 202(l)(2) requires “costs” to be considered in setting vehicle or fuel standards), fuels (CAA § 211(c)(2)(B) requires consideration of “a cost benefit analysis comparing emissions control devices or systems”), nonroad engines and vehicles (CAA § 213(a)(3) requires EPA to give “appropriate consideration” to cost), and aircraft (CAA § 231 authorizes the Administrator to “issue such regulations . . . as he deems appropriate,” which has been held to authorize consideration of cost<sup>29</sup>). The fact that CAA § 211 expressly requires BCA to be used in assessing economic impacts is a strong signal that Congress favors BCA and that it reasonably could be employed under the other more general cost provisions under Title II. EPA should require BCA to be used in conjunction with these Title II determinations.

Ultimately, EPA is authorized or required to consider cost in setting standards under all key CAA programs, except in setting NAAQS. Moreover, the consideration of cost is not so narrowly prescribed under any of the relevant provisions as to preclude EPA from requiring the use of BCA and creating a binding obligation not to regulate unless the incremental benefits justify the incremental costs. For these reasons, EPA has clear and ample authority to require the use of BCA in regulatory decision-making under all key programs, except in setting NAAQS.

### **III. The final rule should require transparency and careful analysis use of costs and benefits attributable to the specific objective of the rule.**

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<sup>27</sup> *Sierra Club v. EPA*, 294 F.3d 155, 162-3 (D.C. Cir. 2002).

<sup>28</sup> 40 C.F.R. § 51.100(o).

<sup>29</sup> *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1230 (D.C. Cir. 2007).

The proposed rule would require the use of BCA to determine total costs and benefits<sup>30</sup> and also the cost and benefits attributable only to the “specific objective” of the rule (i.e., the air pollutant(s) targeted by the given rule).<sup>31</sup> This focus only on the pollutants Congress specifically regulated under separate and distinct portions of the CAA is critical in making meaningful benefit and cost analysis. The ancillary “co-benefits” generated by collateral reductions in non-targeted pollutants often exceed (and sometimes considerably exceed) the benefits attributable to a rule’s specific purpose. This is especially true when a rule produces collateral reductions in PM<sub>2.5</sub>, which is itself a CAA regulated pollutant.<sup>32</sup> This can lead to a misunderstanding of a rule’s true direct benefits and allows for misuse of CAA rulemaking authority by indirectly establishing emissions control programs for a given pollutant using CAA authorities directed at other pollutants (e.g., using § 112 air toxics standards as an indirect means of controlling PM<sub>2.5</sub> emissions).

The “Mercury and Air Toxics Standard” (“MATS”)<sup>33</sup> for power plants addressed by the U.S. Supreme Court in *Michigan* is a good case in point. In summarizing relevant parts of the Regulatory Impact Analysis for MATS, the Court observed that EPA estimated the cost of compliance to be \$9.6 billion per year, the benefits attributable to HAP reductions (the target pollutants) to be \$4 to \$6 million per year, and the benefits attributable to collateral emissions reductions of PM<sub>2.5</sub> and SO<sub>2</sub> to be \$37 to \$90 billion per year.<sup>34</sup> Although EPA did not consider costs in deciding that it was “appropriate and necessary” to regulate power plants under CAA § 112, the fact that the rule would generate net benefits only if collateral emissions reductions were considered was a point that was hotly debated during the litigation, with parties supporting EPA strenuously arguing that the benefits attributable to the collateral emissions reductions caused EPA’s decision to be cost-justified.<sup>35</sup>

Although the Court did not need to rule on this issue (because EPA did not consider cost in making the “appropriate and necessary” determination), this scenario illustrates how a standard designed to control one type of pollutant (in this case, HAPs) might be inappropriately commandeered to indirectly control wholly different pollutants not authorized to be regulated under the given CAA rulemaking authority.

In fact, since EPA retains numerous other regulatory authorities and implementation plans for achieving any required emission reductions in the most cost-effective manner possible,

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<sup>30</sup> Proposed § 83.3(a)(11), 85 Fed. Reg. 35627.

<sup>31</sup> Proposed § 83.4(b), 85 Fed. Reg. 35627.

<sup>32</sup> PM<sub>2.5</sub> benefits estimates can be additionally misleading given that EPA often claims substantial economic benefits from reductions in ambient air concentrations below the PM<sub>2.5</sub> NAAQS. This situation presents the difficult question of how to credit reductions that occur below a level that has been determined to be requisite to protect public health with an adequate margin of safety.

<sup>33</sup> 40 C.F.R. Part 63 Subpart UUUUU.

<sup>34</sup> *Michigan* at \_\_.

<sup>35</sup> *Id.* at \_\_ (“Some of the respondents supporting EPA ask us to uphold EPA’s action because the accompanying regulatory impact analysis shows that, once the rule’s ancillary benefits are considered, benefits plainly outweigh costs. The dissent similarly relies on these ancillary benefits when insisting that “the outcome here [was] a rule whose benefits exceed its costs.”).

ancillary “co-benefits” often represent a significant net opportunity cost, not a net benefit. In other words, if EPA could achieve the same reductions in emissions at half the cost under separate authority, then the “co-benefits” to reducing the targeted pollutant are negative. EPA can avoid the temptation to chase cost-ineffective “co-benefits” by requiring a robust regulatory baseline that reflects all projected federal and state emission reductions, as well as a robust alternatives analysis that outlines the opportunity costs of pursuing “co-benefits” through sub-optimal, if not unnecessary, measures to achieve standards. Another benefit of establishing a robust baseline is that it would prevent inappropriate “double counting” of benefits – i.e., prevent the same emissions reductions from being credited in two or more rules.

To help provide needed transparency in rulemaking, EPA should maintain in the final rule the proposed requirement to include specific estimates for the target air pollutant(s). EPA also should give special consideration when primary benefits do not exceed primary costs, which is a strong signal that an alternatives analysis is required. EPA also should avoid

#### **IV. Conclusion**

Thank you again for undertaking this important rule. If you have questions or need more information, please do not hesitate to contact Maura Valis Lint, Executive Director of the Regulatory Improvement Council (202-393-5055, [mvalis@wvalisllc.com](mailto:mvalis@wvalisllc.com)); Wayne Valis, Founder of the Regulatory Improvement Council ([wvalis@wvalisllc.com](mailto:wvalis@wvalisllc.com)); or Bill Wehrum, Counsel to the Regulatory Improvement Council ([William\\_Wehrum@comcast.net](mailto:William_Wehrum@comcast.net)). We stand ready to provide whatever additional support the Agency may need.

Sincerely,

The Aluminum Association

American Coatings Association

American Coke and Coal Chemicals Institute

American Composites Manufacturers Association

American Forest & Paper Association

American Fuel & Petrochemical Manufacturers

American Iron and Steel Institute

American Wood Council

Color Pigments Manufacturers Association

Commodity Markets Council

Construction Industry Round Table

Corn Refiners Association

The Fertilizer Institute

Industrial Energy Consumers of America

National Asphalt Pavement Association

National Automobile Dealers Association

National Cotton Council

National Grain and Feed Association

National Mining Association

National Oilseed Processors Association

National Tooling and Machining Association

North American Die Casting Association

North American Insulation Manufacturers Association

Pavement Coatings Technology Council

Portland Cement Association

Precision Machined Products Association

Precision Metalforming Association

Small Business & Entrepreneurship Council

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